



BOARD OF INQUIRY (*Human Rights Code*)

Cathy

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF the complaint by Susan Riemer dated April 14, 1994, alleging discrimination in employment on the basis of sex and harassment in employment on the basis of sex.

B E T W E E N :

Ontario Human Rights Commission

- and -

Susan Riemer

Complainant

- and -

York Regional Police and Donald Kirk

Respondent

INTERIM DECISION

Adjudicator : Heather M. MacNaughton

Date : 30 July, 1997

Board File No: BI-0120-97

Decision No : 97-017-I

Board of Inquiry (*Human Rights Code*)

150 Eglinton Avenue East

5th Floor, Toronto ON M4P 1E8

Phone (416) 314-0004 Toll free 1-800-668-3946 Fax: (416) 314-8743

TTY: (416) 314-2379 TTY Tollfree: 1-800-424-1168

A P P E A R A N C E S

Ontario Human Rights Commission)	Kikee Malik, Counsel
)	
Susan Riemer, Complainant)	On her own behalf
)	
York Regional Police and Donald Kirk, Respondents)	Joy L. Hulton, Counsel
)	



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Susan Riemer filed a complaint with the Ontario Human Rights Commission (the "Commission") in which she alleged that she had been discriminated against, and harassed, in her employment on the basis of sex in breach of sections 5(1), 5(2) and 9 of the Ontario *Human Rights Code*, R.S.O. 1990, c. H. 19 as amended (the "Code").

On July 22, 1992, a day I set aside to deal with preliminary matters, I was advised that the Commission and Mrs. Riemer were not proceeding with the complaint against Police Chief Bryan Cousineau. The style of cause of this interim decision reflects that.

Thereafter, the Commission sought an amendment to the complaint to add reprisal, a breach of Section 8 of the *Code*, as a ground. Mrs. Riemer alleges that, in seeking to enforce her rights under the *Code*, she and her husband were the subject of acts of reprisal which consisted of transfers within the York Regional Police Force.

The Law

It is clear from the jurisprudence of the Ontario Board of Inquiry, and the Canadian Human Rights Tribunal, and was not disputed by counsel for the Respondent, that I have jurisdiction to amend a complaint. That jurisdiction arises from the mandate, accorded the Board of Inquiry in Section 39(1)(a) of the *Code*, to determine whether a right of the complainant has been infringed.

The principles which govern the exercise of that jurisdiction were originally set out in *Cousens v. the Canadian Nurses Association* (1981), 2 C.H.R.R. D/365 (Ont. Bd. of Inq.) and approved in *Tabar and Lee v. David Scott and West End Construction Limited* (1982), 3 C.H.R.R. D/1073 (Ont. Bd. of Inq.). In *Cousens* the Board held that it had a mandate to inquire into allegations of discrimination which extended beyond the specific ground of contravention alleged in the complaint. Further, the complaint form differed from an information or indictment in a criminal proceeding in that it served only as general notice to a party in an administrative

proceeding. That principle has been affirmed more recently by the Ontario Board of Inquiry in *Entrop v. Imperial Oil Ltd (No. 3)* (1994), 23 C.H.R.R. D/186 and *Moffat v. Oswin and The Kinark Child and Family Services* (unreported, October 31, 1996).

In deciding whether to exercise my jurisdiction in this case, I must assess the prejudice to the Respondents. If I find that the Respondents are prejudiced I must consider whether that prejudice can be rectified by allowing the Respondents further time to prepare to meet the allegations.

Argument

Counsel for the Respondent argued that the facts in this case are such that I should not exercise my jurisdiction to amend. She argued that the excess of 4 years between the alleged acts of reprisal, the filing of the complaint, and the notice by the Commission of its intention to seek to add reprisal as a ground, is such that the Respondents will be unable to properly defend themselves against the allegations. The acts of reprisal now sought to be added to the complaint occurred before the complaint was filed with the Commission. Counsel advised that the Respondent dealt with the allegations of punitive transfers internally, prior to the complaint being filed, and believed they had been resolved. That belief, she said, was reinforced by the fact that the alleged reprisal acts did not form part of the complaint. In the result, she submits, the Respondents were prejudiced. They took no steps to interview witnesses on this issue and to preserve their evidence by way of witness statements. She submitted that this prejudice to the Respondents cannot now be corrected by the granting of additional time.

Conclusion

I agree that the facts of this case are unusual. There was however no evidence before me on which I could make a finding of prejudice. It is not sufficient for counsel to say that prejudice

existed, that prejudice must be demonstrated by evidence setting out the nature and extent of the prejudice.

It is one of the unfortunate realities of our current human rights processes that adjudicators are often asked to make findings of fact based on testimony about events which occurred many years before the hearing. In the course of the hearing it is expected that any lapses of memory will be exposed and tested. Moreover, it is always open to the Respondents to make submissions to me during the hearing regarding the weight that should be attached to evidence of this sort.

Further, the Respondents have been aware from the outset that Mrs. Riemer was alleging harassment in her employment. Many of the facts which will go to support a finding of harassment, should one be made, will overlap with those relied on to support a finding of reprisal.

I conclude that it is in the interests of the parties, and of the administration of the human rights process, to have all of these allegations dealt with in one hearing and to amend the complaint to add the allegation of reprisal against Mrs. Riemer.

With respect to the allegation regarding the reprisal against Michael Riemer, that is only relevant to the extent that the Commission and Mrs. Riemer are able to persuade me that Mr. Riemer's transfer was an act of reprisal against Mrs. Riemer and impacted on her.

Dated at Toronto this 30th day of July, 1997:

Heather M. MacNaughton
Heather M. MacNaughton
Member, Board of Inquiry

